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FRCP, on 7/30/99 By /s/ lah

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

TOM GLENN HENRY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	NO. 3:96-0435
	)	JUDGE NIXON
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION

I.

INTRODUCTION

The motion to vacate under 28 U.S.C. § 2255 filed in this action was referred to the Magistrate Judge to consider a proposed amended motion (Docket Entry No. 12). The District Court earlier canceled an evidentiary hearing on the motion in light of Johnson v. United States, 520 U.S. 461, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997), and movant stated that he would reconsider some of his claims and file an amended motion. Yet, the proposed amended motion was not filed. Thus, this Report and Recommendation considers the original motion to vacate to which the United States has responded (Docket Entry Nos. 1 and 8).

Movant, Tom Henry, asserts several grounds to vacate his convictions for conspiracy to defraud Medicare, theft of government funds, money laundering as well as aiding and abetting such acts; paying kickbacks for referrals of patients as well as aiding and abetting such acts; obstruction of a federal auditor; and filing false claims, as well as aiding and abetting such acts (Docket Entry No. 1, Motion at p. 1). Henry's specific claims are: (1) that the District Court's jury instructions

failed to instruct his jury on the materiality element for the offenses under 18 U.S.C. § 1001, in violation of his rights under the Fifth and Sixth Amendments; (2) that the District Court failed to instruct his jury that materiality is an essential element of the offenses charged under 18 U.S.C. § 287; (3) that the reversal of the above convictions operate to vacate his convictions of making false statements and claims; (4) that Counts 6 through 13 and 36 of the indictment were multiplicitous and in violation of the Double Jeopardy Clause; (5) that the errors at his trial were so numerous so as to render his trial fundamentally unfair and to require vacating all of his convictions; (6) that he had ineffective assistance of counsel at trial in violation of his Sixth Amendment rights; and (7) that given the merits of his claims, movant must be resentenced.

In response to the motion, the United States argues, in sum: (1) that Henry's claims are procedurally defaulted because Henry did not raise his principal claims on direct appeal; (2) that the Supreme Court's decision in Gaudin[1] relied upon by Henry was later clarified in Johnson, and is a new rule and that as a matter of law, the jury instructions at his trial do not warrant setting aside Henry's convictions; (3) that Henry's superseding indictment was not multiplicitous in violation of the Double Jeopardy Clause because convictions involve distinct offenses and facts; and (4) Henry's trial counsel was not ineffective.

For the reasons set forth below, the Magistrate Judge concludes that Henry's jury instructions claims and Double Jeopardy claims are procedurally defaulted for his failure to raise those claims in his direct appeal. As a matter of law, Henry's trial counsel was not ineffective for his cited omissions so as to establish cause and prejudice to excuse Henry's procedural default. Regardless of whether Gaudin represents a new rule, Henry has not presented proof that the Gaudin error

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[1]United States v. Gaudin 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995) (holding that at trial, the issue of materiality is to be decided by a jury, not the court).

so prejudiced his trial as to compromise the integrity of that proceeding. Henry's superseding indictment had separate counts based upon distinct facts and separate offenses so as to not violate the Double Jeopardy Clause. Henry's remaining claims that are tied to these claims lack merit. Thus, Henry's motion to vacate his convictions should be denied.

II.
FINDINGS OF FACT[2]

Tom Henry was indicted on May 7, 1991, but that indictment was superseded on February 20, 1992. The superseding indictment contained 36 counts charging Henry in all counts, except Count 30. The specific counts were as follows: (1) Counts 1 through 3 charged a conspiracy to defraud Medicare under 18 U.S.C. § 371; (2) Counts 4 and 5 charged theft from a program receiving federal funds under 18 U.S.C. § 666(a)(1)(A); (3) Counts 6 through 13 charged money laundering and aiding and abetting money laundering under 18 U.S.C. §§ 1957 and 2; (4) Counts 14 through 29 charged false statements made to Medicare and aiding and abetting in the false statements under 18 U.S.C. §§ 1001 and 2; (5) Count 31 charged paying kickbacks for referring patients 42 U.S.C. § 1320(a)-7(b)(2)(a) and in aiding and abetting under 18 U.S.C. § 2; (6) Counts 32 through 34 charged obstruction of a federal auditor and aiding and abetting in this activity under 18 U.S.C. §§ 1516 and 2; (7) Count 35 charged making false claims and aiding and abetting in this activity under 18 U.S.C. §§ 287 and 2. Henry was not charged in Count 30.

Count 36 was a forfeiture count that sought forfeiture of a house and land, and $191,206.80 in currency. The premise of this count was that if Henry were convicted of Counts 4 through 13 of the indictment, then the property and currency acquired with proceeds from these illegal acts should be forfeited. This count also sought to forfeit substitute assets of Henry's, if certain conditions made collection of the specified

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[2]From the parties' papers (Docket Entry Nos. 2, 8 and 9), the pertinent facts are not in dispute.

property difficult or non-feasible. The property was sought under 18 U.S.C. §§ 1957 and 982, and the substitute assets were sought under 18 U.S.C. § 982(b)(1)(A).

At trial, the Court instructed the jury on offenses under 18 U.S.C. § 1001 as follows:

"In order to sustain its burden of proof for the crime if knowing and willfully making a false statement to the United States government as charged in Counts Fourteen through Twenty-Nine of the indictment, the government must prove the following four essential elements with regard to each count, and as to each defendant charged, beyond a reasonable doubt;

First, that the defendant knowingly made or used a false or fictitious writing or document detailed in the indictment.

Second, that in making or using the false or fictitious writing or document, the defendant acted willfully, knowing the writing or document to contain a false or fictitious statement or entry.

Third, that the statement was made in a matter within the jurisdiction of any department or agency of the United States.

Fourth, that the statement was material.

The court has already decided that the matters alleged in these counts are within the jurisdiction of the United States, and that the alleged statements are material.

Therefore, you are only to decide element one, whether the defendants knowingly made a false, fictitious or fraudulent statement or representation; and element two, whether in making such a statement or representation the defendants acted willfully. The fact that the Court has found the third and fourth elements to be satisfied, should not be considered by you in any way in deciding whether the government has met its burden of proof with regard to the first two elements. (emphasis

supplied).

(Docket Entry No. 2 at pp. 3-4).

As to Count 35, for offenses under 18 U.S.C. § 287, the Court instructed the jury as follows:

In order to sustain its burden with respect to Count Thirty-Five of the indictment, the government must prove the following three elements beyond a reasonable doubt.

First, that the defendant presented to a department or agency of the United States a claim upon or against the United States, or any department or agency thereof.

Second, that the claim presented was false, fictitious, or fraudulent.

Third, that the defendant knew the claim to be false, fictitious, or fraudulent.

The United States Department of Health & Human Services is an 'agency of the United States' within the meaning of this section. Claims presented under Medicaid or Medicare to a private insurance company acting as intermediary are 'presented to a department or agency in the civil service of the United States' if that private insurance company has been contracted by the government to administer the program.

Id. at p. 4. In a word, Henry cites the absence of any jury instruction on the materiality required for these offenses.

After a jury trial, Henry was convicted on June 23, 1992 and found guilty of Counts 1 through 35, except Count 14 of which he was acquitted and Count 30 in which he was not charged. The jury found that the $191,206.80 in currency should be forfeited, but found that the house and land claimed by Henry's wife to be her separate property, should not be forfeited.

Henry appealed his conviction to the Court of Appeals for the Sixth Circuit and on appeal raised the claims relating only to lack of jurisdiction, jury instructions on unanimity, multiplicitous indictment as to Counts 4 and 5; sufficiency of the evidence on Counts 4 and 5, and forfeiture issues. In a per curiam decision filed November 29, 1993, the Sixth Circuit affirmed his conviction and a mandate issued on February 1, 1994 (a copy of that opinion is attached hereto). As pertinent here, the Court made two distinct findings and conclusions:

Tom Henry contends that Counts Four and Five of the superseding indictment must be dismissed because they are multiplicitous. In Counts Four and Five, Tom Henry is charged with using two separate schemes to violate 18 U.S.C. § 666, Theft from a Program Receiving Federal Funds. Although the time during which the violations occurred was overlapping, in one scheme Tom Henry used funds embezzled from THS, an organization receiving federal funds, to purchase real estate, and in another scheme he used the funds to pay his personal expenses. The separate nature of these two acts properly constitute a basis to charge them both as separate offenses.

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The government's evidence established that from 1987 to 1989, Tom Henry received $264,181.45 from THS in excess of sums legitimately due him. The evidence demonstrated that he used this money for personal expenses, such as credit card expenses, furriers and vacations. The jury properly concluded that he intended to misapply the THS money for personal expenses. Therefore, this Court upholds the convictions on Counts Four and Five, as well as the related charged in Counts Six through Thirteen and Thirty-six. U.S. v. Henry, 12 F.3d 215, 1993 WL 492302, at *6 (6th Cir. 1993).

There was also an appeal on the forfeiture of his and his

wife's real property. United States v. Henry, 64 F.3d 664, 1995 WL 478635 (6th Cir. 1995) that did not raise the Double Jeopardy claim about his forfeiture conviction. (A copy of this opinion is also attached).

Henry has now completed his term of incarceration and is currently on supervised release.

III.
CONCLUSIONS OF LAW

As a threshold issue, the Magistrate Judge considers the United States' argument that Henry's principal claims concerning the jury instruction and multiplicitous indictment are procedurally barred because these claims were not raised on direct appeal and thus, these claims cannot be considered by the Court under § 2255 unless Henry can establish cause and prejudice for his failure to present them on his direct appeal. Murray v. Carrier, 477 U.S. 478, 492, 106 S.Ct 2639, 91 L.Ed.2d 397 (1986). Henry responds that his trial counsel's omissions justify his failure to raise these issues on appeal and also constitutes prejudice.

The "Procedural Default Doctrine" may bar consideration of a claim under § 2255 and the Supreme Court defined this doctrine as follows:

[t]his Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. This rule applies whether the state law ground is substantive or procedural. In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would, therefore, be advisory...

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...the doctrine applies also to bar federal habeas when a state court declined to address a prisoner's federal claims

because the prisoner had failed to meet a state procedural requirement. In these cases, the state judgment rests on an independent and adequate state procedural ground. Coleman v. Thompson, 501 U.S. 722, 729-30, 111 S.Ct. 2546, 2553-54, 115 L.Ed.2d 640 (1991) (emphasis added and citations omitted).

Although Coleman involved a state post-conviction challenge, this doctrine applies with equal force to federal prisoners' motions to vacate under 28 U.S.C. § 2255. United States v.Frady, 456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982). "A collateral challenge (under § 2255) may not do service for an appeal." Frady, 452 U.S. at 165 (citations omitted).

As applied here, Henry did not raise the jury instruction claim on direct appeal but did raise a claim of multiplicitous indictment, but only as to Counts 4 and 5 of the superseded indictment. Henry's claim here is that Counts 4 and 5, theft from the Medicare program renders Counts 6 through 13 on money laundering and Count 36 on forfeiture multiplicitous and his convictions thereunder should be vacated. (Docket Entry No. 2, Movant's Brief at pp. 19, 21). Henry refers to the Court's jury instructions that if the jury acquitted Henry on Counts 4 and 5, then the jury must acquit also on Counts 6 through 13 and 36. Id. The latter claim is new and different from Henry's multiplicitous indictment claims on direct appeal. Thus, the doctrine of procedural default applies here.

Once a procedural default is established, the movant must establish cause and prejudice to excuse his failure to raise these claims on direct appeal. Frady, 456 U.S. at 167-68. The "cause" for the default must be external to the movant and must otherwise be attributable to the government.

...we think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule. Without attempting an exhaustive catalog of such objective impediments to compliance with a procedural rule, we note that a showing that the factual or legal basis for a claim was not rea-

sonably available to counsel, see Reed v. Ross, 468 U.S., at 16, or that 'some interference by officials,' Brown v. Allen, 344 U.S. 443, 486 (1953), made compliance impracticable, would constitute cause under this standard. Carrier, 477 U.S. at 488 (emphasis added).

Defense counsel's failure to raise an issue can establish cause, but only if counsel's conduct violates Sixth Amendment standards.

So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in Strickland v. Washington, supra, we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default.

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Similarly, if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State, which may not 'conduc[t] trials at which persons who face incarceration must defend themselves without adequate legal assistance.' Cuyler v. Sullivan, 446 U.S. 335, 344 (1980). Ineffective assistance of counsel, then, is cause for a procedural default. Carrier, 477 U.S. at 488-89.

The Supreme Court emphasized in Coleman that mere attorney error cannot be cause and cannot be attributable to the state.

Attorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.' ...Attorney error that constitutes ineffective assistance of counsel is cause, however ... as Carrier explains, 'if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself

requires that responsibility for the default be imputed to the state.' [quoting Carrier, 477 U.S. at 488]. In other words, it is not the gravity of the attorney's error that matters, but that it constitutes a violation of petitioner's right to counsel, so that the error must be seen as an external factor, i.e., 'imputed to the state.' 501 U.S. at 753-54 (emphasis added).

The standard for cause attributable to counsel is the constitutional standard under the Sixth Amendment for attorney performance, i.e., whether counsel provided "reasonably effective assistance." Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Under Strickland, counsel's performance must be both inadequate and prejudicial to the defense.

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. 466 U.S. at 687.

The Court of Appeals for this Circuit has observed as to whether counsel's failures were constitutionally infirm, that

No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. Id. at 688-89, 104 S.Ct. at 2065. What is more, judicial scrutiny of counsel's

performance must be highly deferential. The court should begin with 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' Id. at 689, 104 S.Ct. at 2065. 'A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.' Id.

The Supreme Court recognized that in the context of ineffective assistance claims based on counsel's 'failure to investigate,' the temptation to rely on hindsight is particularly strong. Consequently, the Court made clear that 'strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable....' Id. at 690, 104 S.Ct. at 2066. However, 'strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Id. at 690-91, 104 S.Ct. at 2066 (emphasis added). Sims v. Livesay, 970 F.2d 1575, 1579-80 (6th Cir. 1992) (emphasis added).

The cited reasons for Henry's trial counsel's alleged omissions and ineffectiveness to establish cause and prejudice are interwoven with the merits of his underlying claims in his motion to vacate. As a practical matter, to consider if his counsel were ineffective for procedural default purposes, requires a consideration of the merits of Henry's claims on jury instructions and his multiplicitous indictment claims.

At the time of Henry's trial, the Sixth Circuit rule was that the materiality element of a criminal offense was an issue to be determined by the Court. United States v. Chandler, 752 F.2d 1148, 1150-51 (6th Cir. 1985) cited in Johnson, 520 U.S.

at 468 n. 1. The cited footnote in Johnson illustrates that this was the rule in virtually all of the circuits. Id. Chief Justice Rhenquist noted that "every Court of Appeals that has considered the issue, except for the 9th Circuit, has held that the question of materiality is one of law." Id.

Moreover, in United States v. Dedhia, 134 F.3d 802 (6th Cir. 1998), the Sixth Circuit applied Gaudin and citing Johnson, the Court concluded that although there was clear error on the jury instruction, the evidence did not demonstrate that the Gaudin error was prejudicial or reversible error, because considering the record as a whole, the Gaudin error did not "seriously effect the fairness, integrity, or public reputation of judicial proceedings."

Here, Henry's trial counsel's failure to raise the jury instructions was not ineffective as that principle of law was well settled. Henry has not shown that at the time of his trial and appeal, that there was a basis to revisit the rule. The Magistrate Judge also concludes that however one characterizes Gaudin as a new rule[3], as a practical matter, any error under Gaudin requires a showing that the error clearly impacted the integrity or fairness of the trial. Henry has not demonstrated that the Gaudin error seriously affected the fairness, integrity or public reputation of his trial. Without such a showing, Henry's counsel could not have been the cause of his procedural default. In these circumstances, the Magistrate Judge concludes that Henry's trial counsel was not ineffective for his failure to object to the jury instruction on the materiality issue or to raise that issue on direct appeal.

As to counsel's failure to challenge the alleged multiplicitous indictment at the trial or on appeal, the Double Jeopardy Clause of the Fifth Amendment "protects against multiple punishments for the same offense", North Carolina v. Pearce,

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[3]Teague v. Lane, 489 U.S. 288, 299, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), unless Congress expressly intended multiple punishments. Albernaz v. United States, 450 U.S. 333, 344, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981).

"A multiplicitous indictment charges a single offense in several counts. Its dangers are that a defendant may be given multiple sentences for what Congress considered a single offense." United States v. Duncan, 850 F.2d 1104, 1108 n.4(6th Cir. 1988) cert. denied, 493 U.S. 1025 (1990). In resolving the multiplicity claim, a critical first question is whether Congress intended the acts charged under a statute to constititute a single crime or multiple offenses. Garrett v. United States, 471 U.S. 773, 778, 105 S.Ct 2407, 85 L.Ed.2d 764 (1985); United States v. Lilly, 983 F.2d 300, 302 (1st Cir. 1992). The relevant inquiry is whether Congress intended separate offenses.

The standard for determining the separateness of offenses was established in Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932), as follows: "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Accord, United States v. Dixon, 509 U.S. 688, 696, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993); Downey v. Clauder, 30 F.3d 681, 686 (6th Cir. 1994). Blockburger's statutory test applies to § 2255 claims under the Double Jeopardy Clause. Banner v. Davis, 886 F.2d 777, 781 (6th Cir. 1989).

The Blockburger test is a rule of statutory construction that requires an inquiry into the Congress' intent in enacting the several statutes. Missouri v. Hunter, 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983). Compare Costo v. United States, 904 F.2d 344, 346-47 (6th Cir. 1990) with United States v. Barrett, 933 F.2d 355, 360 (6th Cir. 1991). Yet, "the first step is for the Court to inquire 'whether Congress intended to punish each statutory violation separately.'" United States v. Hebeka, 89 F.3d 279, 282 (6th Cir. 1996). The Blockburger test requires

an analysis of the statutory elements (i.e., whether the offense can ever require proof of a fact the other does not), and there must be a clear legislative intent to impose cumulative sentences. United States v. Benton, 852 F.2d 1456, 1465; Pryor v. Rose, 724 F.2d 525, 529 (6th Cir. 1984) (en banc).

The alleged multiplicitous charges are Counts 6 through 13, money laundering, 18 U.S.C. § 1957[4] and Count 36 forfeiture, 18 U.S.C. §§ 982[5] 1957. Courts that have considered these statutes have found them to be distinct offenses that Congress intended to punish separately. U.S. v. Kirkland, 34 F.3d 1068, 1994 WL 454864 at *4-5 (6th Cir. 1994), cert. denied 515 U.S. 1136, 115 S.Ct 2567, 132 L.Ed.2d 819 (1995). See also United States v. Conley, 37 F.3d 970, 977 (3rd Cir. 1994) (illegal gambling and money laundering distinct offenses under Blockburger and Congress intended multiple punishments); United States v. Smith, 46 F.3d 1223 (1st Cir. 1995), cert. denied, _U.S._116 S.Ct 176, 133 L.Ed.2d 116 (1995) (quoting United States v. LeBlanc, 24 F.3d 340, 346 (1st Cir. 1994) cert. denied. 513 U.S. 896, 115 S.Ct. 250, 130 L.Ed.2d 172 (1994) (Congress "intended money laundering to be a separate offense from the underlying offense that generated the money")); United States v. Lovett, 964 F.2d 1029, 1042 (10th Cir. 1992) (Money laundering statute created new federal offense distinct from unlawful activity that generates money); United States v. Finn, 919 F.Supp 1305, 349 (D. Minn. 1995) ("Congress intended money laundering to be a separate offense from the 'specified illegal activity' that is its predicate offense") (quoting United States v.

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[4] 18 U.S.C. § 1957(a) provides, in pertinent part, "Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b)."

[5] 18 U.S.C. § 982(a)(1) provides, in pertinent part, "The court, in imposing sentence on a person convicted of an offense in violation of section 5313(a), 5316, or 5324 of title 31, or of section 1956, 1957, or 1960 of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.

Edgmon, 952 F.2d 1206,1213 (10th Cir. 1991) cert. denied 505 U.S. 1223, 112 S.Ct 3037, 120 L.Ed.2d 906 (1992); United States v. El-Difrawi, 898 F.Supp. 3, 9-11 (D.D.C. 1995) (forfeiture and money laundering separate offenses).

Based upon these authorities, the Magistrate Judge concludes that in the first step analysis, Congress clearly intended money laundering and criminal forfeiture to be separate and distinct offenses for which separate punishments could be imposed. Thus, there is not a violation of the Double Jeopardy Clause in Henry's superseded indictment.

Moreover, "it is well settled that a single transaction can give rise to distinct offenses under several statutes without violating the Double Jeopardy Clause." Alberznaz, 450 U.S. at 345, n.3. The Supreme Court held that the offenses of importing marijuana and distributing marijuana were separate offenses because they required proof of different facts. In a related vein, the protection against multiple prosecutions for the same offense is not implicated if the charges are all contained in a single indictment. Johnson v. Ohio, 467 U.S. 493, 501, 104 S. Ct 2536, 81 L. Ed. 2d 425 (1984); United States v. Barrett, 933 F.2d at 360. Under the Double Jeopardy Clause, the offenses must be based upon proof of different facts to avoid a violation of this right. United States v. Miller, 870 F.2d 1067, 1071 (6th Cir. 1989).

There is no dispute that these separate counts involved different times and transactions. See Henry, 1993 WL 492302 at * 1-3. In such circumstances, the Sixth Circuit has ruled that where there

"...are separate courses of conduct for which separate and discrete sanctions and punishments are applicable...Grady...expressly permits the Government to prosecute a defendant for multiple offenses in a single proceeding...in [United States v. Louisville Edible Oil Products, 962

F.2d 584, 588 (6th Cir. 1991)]...we emphasize that the Blockburger test requires a determination of whether each provision required proof of an additional fact which the other does not." United States v. Hughes, 964 F.2d at 536, 542 (6th Cir. 1992) (citations omitted).

Given that the transactions in Henry's indictment undisputedly occurred in different months and involved different years and violated distinctly different statutes, the Magistrate Judge concludes that there are no double jeopardy violations. Counsel's failure to challenge the indictment on this ground was not ineffective assistance of counsel. Thus, Henry cannot establish cause for his procedural default of his two peripheral claims.

With these conclusions, the Magistrate Judge also concludes that the other claims in the petition, that the above cited alleged errors require resentencing and resulted in an unfair trial, lack merit and that Henry's motion to vacate his sentence should be denied.

IV. RECOMMENDATIONS

For the reasons stated above, the Magistrate Judge recommends that the movant's motion to vacate his sentence (Docket Entry No. 1) be denied. Under Rule 72(b) of the Federal Rules of Civil Procedure, any party has ten (10) days from receipt of this Report and Recommendation in which to file any written objections to this Recommendation, with the District Court. Any party opposing said objections shall have ten (10) days from receipt of any objections filed to this Report in which to file any responses to said objections. Failure to file specific objections within ten (10) days of receipt of this Report and Recommendation can constitute a waiver of further appeal of this Recommendation. Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985), reh'g denied, 474 U.S. 1111 (1986).

ENTERED this 30th day of July, 1999.

/s/ William J. Haynes
WILLIAM J. HAYNES, JR.
United States Magistrate Judge

This document was entered on the docket in compliance with Rule 58 and / or Rule 79 (a).
FRCP, on 9/29/99 By /s/ lah

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

TOM GLENN HENRY,	)	
Petitioner,	)	
V.	)	No. 3:96-0435
	)	Judge Nixon
UNITED STATES OF AMERICA,	)	
Respondent.	)	

MEMORANDUM ORDER

Pending before the Court is the Magistrate's Report and Recommendation, (Doc. No. 17), to which Petitioner has filed a timely objection, (Doc. No. 18). The government has also filed a Response to Petitioner's objections, (Doc. No. 21), to which Petitioner has filed a Reply, (Doc. No. 22).

Upon review of the record and relevant case law, the Court finds the Magistrate's Report and the reasoning contained therein to be well-founded, and ADOPTS it in its entirety. However, as noted by Petitioner in his objections to the Report, the Report fails to consider all of Petitioner's claims. Specifically, the Report fails to consider Petitioner's claims that: (i) the district court erred in its failure to allow the jury to consider whether the false statements that formed the basis of the charges brought against him pursuant to 18 U.S.C. § 1001 was made within a matter within the jurisdiction of any department or agency of the United States; and (ii) the district court erred when it failed to allow the jury to consider whether the false statement that formed the basis of the count charging a violation of 18 U.S.C. § 287 was presented to a department or agency of the United

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[1] Petitioner objects to this omission in the Magistrate's Report two times, but the Court notes that the claims are substantially the same. (See Pet."s Obj., at ¶¶ 2, 5)

[2] The facts relevant to the instant Memorandum are set forth in the Magistrate's Report and Recommendation and will not be repeated herein.

States.[1] Each of these claims are considered below.[2]

18 U.S.C. § 1001

Petitioner complains that this Court erred in instructing the jury that the false statements forming the basis of his conviction under 18 U.S.C. § 1001 were "made in a matter within the jurisdiction of any department or agency of the United States."[3] (Pet's. Obj., ¶ 1.) A careful reading of Petitioner's Objections in their entirety reveals this complaint to be twofold: Petitioner argues that the Court erred in instructing the jury that the statements at issue were (a) made *to a department or agency* of the United States and (b) made in a matter *within the jurisdiction* of the United States. Petitioner maintains that determination of these elements of 18 U.S.C. § 1001 lies within the exclusive province of the jury.

Petitioner's complaints are without merit. First, whether the United States Department of Health and Human Services ("HHS") and a private insurance company acting as an intermediary between doctors and HHS are "agenc[ies] of the United States" within the meaning of the statute are matters "within the province of the court to decide." United States v. Shields, 1992 WL 43239, at #6 (N.D. Ill.); see also Terry v. United States, 131 F.2d 40 (8th Cir. 1942). It is indisputable that HHS is a department or agency of the United States. See 5 U.S.C. § 101 (West 1999) (defining HHS as an agency within the executive branch of the United States government). Such legislative facts need not be submitted to the jury for determination in a criminal or civil case. United States v. Gould, 536 F.2d 216 (8th Cir. 1976).

Insofar as Petitioner is complaining that this Court incorrectly determined that a private insurance company under contract with HHS for the purpose of administrating or processing

[1] The False Statement Act provides, in relevant part:
[W]hoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully ...makes any materially false, fictitious or fraudulent statements or representations, ...[shall be punished.]

Medicare claims or carrying out HHS programs is a "government agency" within the meaning of this statute, it is well-established that such companies are in fact agencies under the statutory definition, and that claims submitted to such companies may form the basis of criminal liability under Section 1001.[4] See, e.g., United States v. Calhoon, 97 F.3d 518, 522 (11th Cir. 1996) (sustaining conviction under Section 1001 where Medicare reimbursement requests submitted first to private insurance companies acting under contract with the Health Care Financing Administration); United States v. Kraude, 467 F.2d 37, 38 (9th Cir. 1972) (holding that, where HHS entered into written contract with insurance company to handle Medicare forms and determine payment to doctors, insurance company was agent of HHS for that purpose and false statements made in conjunction with claims submitted to insurance company were matters within the jurisdiction of the United States) (citing cases); see also United States v. Lewis, 587 F.2d 854, 857 (6th Cir. 1978) (fraud perpetrated on federal AFDC program operated locally by State of Michigan was fraud perpetrated upon and within the jurisdiction of any department or agency of the United States). As such, Petitioner's claim that the Court erroneously withheld this issue from the jury's consideration must fail.

Second, Petitioner complains that the Court erroneously withheld from the jury consideration of the elements of jurisdiction in 18 U.S.C. § 1001. He argues that his conviction under Counts 14-39 should be reversed because the Court eviscerated the jury's role as trier of fact by withholding more than one element of 18 U.S.C. § 1001 from the jury's consideration, namely, the elements of jurisdiction and of materiality.[5]

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[4] Indeed, it is not necessary that the false statement be presented directly to a federal agency; guilt under 18 U.S.C. § 1001 may be found if the statement is made in the course of some intended relationship to a matter within an agency's jurisdiction. United States v. Rodgers, 466 U.S. 475 (1984); United States v. Richmond, 700 F.2d 1183, 1187-88 (8th Cir 1983).

[5] The issue of materiality was discussed at length in the Magistrate's Report and Recommendation. The Magistrate found that, although the

Although the jurisdictional element of 18 U.S.C. § 1001 traditionally has been treated as a question of law for the Court to decide, see, e.g., Shields, supra, and Gould, supra, it is necessary to consider the failure to submit the element to the jury in light of the Supreme Court's recent decisions in United States v. Gaudin, 515 U.S. 506 (1995), and Neder v. United States, 119 S. Ct. 1827 (1999). In Gaudin, a unanimous Supreme Court ruled that "[t]he Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." 515 U.S. at 522. Subsequently, in Neder, the Court held that failure to charge an element of the offense in the indictment is subject to the traditional harmless error analysis set forth in Federal Rule of Criminal Procedure 52(a). 119 S.Ct. at 1835. Rule 52(a) provides that, "[a]ny error, defect, irregularity or variance [during the course of a trial] which does not affect substantial rights shall be disregarded." Fed. R. Crim. P. 52(a). An error affecting substantial rights deprives a defendant of those "basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." Neder, 119 S.Ct. at 1833 (internal citations omitted).

As an initial matter, it is necessary to consider whether the harmless error analysis should apply at all in a case where two of the elements were taken erroneously from the jury's consideration by the Court. See generally Sullivan v. Louisiana, 505 U.S. 275, 281-82 (1993) (holding that harmless error analysis was inapplicable where error in reasonable doubt instruction vitiated all of the jury's findings). The Court holds that the harmless error analysis does in fact apply to the instant case, because withholding both jurisdiction and materiality from the jury's consideration did not vitiate all of the jury's findings in this case. See id.; Neder, 119 S.Ct. at 1834. Indeed,

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Court erred in refusing to submit the issue of materiality to the jury, such error was harmless. (See Doc. No. 17.)

the jury was still able to consider whether Petitioner knowingly, voluntarily and intentionally made a false, fictitious or fraudulent statement to a government agency in violation of 18 U.S.C. § 1001. As such, the errors in the jury instructions did not prevent the criminal trial from serving its function as a vehicle for determination of Petitioner's guilt or innocence.

Applying Rule 52(a) to the jurisdiction instruction, the Court finds the failure to submit this element of 18 U.S.C. § 1001 to the jury to be harmless error. In this case, Petitioner was "convicted in a jury trial in which *the proof and the jury instruction[s]* conformed to the allegations in the indictment." United States v. Stoddard, 875 F.2d 1233, 1237 n. 3 (6th Cir. 1989) (emphasis added). Accordingly, "[t]he omission did not seriously affect the fairness or integrity of ...[Petitioner's] trial, or the public reputation of [the] judicial proceedings, as the jury necessarily considered facts predicate to the finding of ...[jurisdiction] in reaching its verdict." United States v. McGhee, 119 F.3d 422, 424 (6th Cir. 1997) (applying Gaudin). Furthermore, "[t]he district court's jurisdiction in a criminal proceeding is generally established by the indictment," and it is indisputable that the Court properly exercised its jurisdiction over the actual charges contained in the indictment. Stoddard, 875 F.2d at 1236. As such, Petitioner cannot demonstrate that the Court's failure to charge the jury with the jurisdictional element affected his substantial rights. Accordingly, Petitioner's second claim is without merit.

18 U.S.C. § 287 [6]

Petitioner complains that the Court erred when it instructed the jury that a private insurance company was a department or agency of the United States. However, a private insurance company contracting with HHS to administer Medicare and other programs is an agency within the scope of 18 U.S.C. §

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[6] 18 U.S.C. § 287 provides, in relevant part:
Whoever makes or presents to any. . .department or agency. . .[of the United States] . . .any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious or fraudulent . . . [shall be punished].
18 U.S.C. § 287 (West 1999).

287. See, e.g., United States v. Precision Med. Labs, Inc., 593 F.2d 434, 437, 442 (2d Cir. 1978) (private insurance companies that had contracted with government to administer Medicare were agencies within scope of Section 287 and conviction under that statute upheld where claims were submitted to such companies). As discussed above, such legislative facts are properly within the province of the Court to decide. Accordingly, Petitioner's claim with respect to 18 U.S.C. § 287 is without merit as well.

CONCLUSION

For the reasons stated above, the Court ADOPTS the Magistrate's Report and Recommendation in its entirety. The Report, however, failed to take into account several of Petitioner's specific objections. Considered herein, the Court finds those objections to be without merit, and this action is therefore DISMISSED with prejudice.

It is so ORDERED.
Entered this the 24th day of September, 1999.

/s/ John T. Nixon

JOHN T. NIXON
UNITED STATES DISTRICT COURT

This document was entered on the docket in compliance with Rule 58 and / or Rule 79 (a).
FRCP, on 11/19/99 By /s/ mg

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Tom Glenn Henry	)	
	)	
	)	
v.	)	Case No. 3:96-0435
	)	Judge Nixon
	)	
United States of America	)	

ORDER

Pending before the Court is Petitioner Tom Glenn Henry's Motion for Issuance of Certificate of Appealability, (Doc. No. 24). Upon review of the record and relevant case law, the Court has determined Petitioner's Motion lacks merit. Accordingly, Petitioner's Motion is DENIED.

It is so ORDERED.
Entered this the 18th day of November, 1999.

/s/ John T. Nixon
JOHN T. NIXON
UNITED STATES DISTRICT COURT

FILED
April 10 2000
LEONARD GREEN, Clerk

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APPENDIX D

No. 99-6574

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TOM GLENN HENRY,	)	
	)	
Petitioner-Appellant,	)	
v.	)	ORDER
UNITED STATES OF AMERICA,	)	
	)	
Respondent-Appellee.	)	
	)	
	)	

Before: MARTIN, Chief Judge.

Tom Glenn Henry, through counsel, seeks a certificate of appealability in his appeal from a district court judgment that denied his 28 U.S.C. § 2255 motion.

Because Henry has not made a substantial showing of the denial of a constitutional right, *see* 28 U.S.C. § 2253(c)(2), a certificate of appealability is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Clerk

APPENDIX E

28 U.S.C. § 1001. Statements or entries generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title or imprisoned not more than 5 years, or both.

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to—

(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or

(2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

28 U.S.C. § 287. False, fictitious or fraudulent claims

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.

28 U.S.C. § 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inad-

equate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

1 The direct appeal of that conviction resulted in an unpublished affirmance by the United States Sixth Circuit Court of Appeals. United States v. Henry, 12 F.3d 215 (Table) (6th Cir. 1993)

2 While it is difficult to determine from this "kitchen sink" indictment what the prosecution's forfeiture theory was, it apparently was that if Petitioner was convicted of Counts 4-13, charging theft from a government program, money laundering, and aiding and abetting, the property and currency listed should be forfeited since it was acquired from those illegal acts. Count 36 alternatively sought forfeiture of substitute assets if the listed ones could not be collected.

3 The Government evaded this verdict by convincing the judge that the money to purchase the house and land came from Petitioner's alleged wrongful activities. The house and land was seized and sold by the Government.